87-1805

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DAVID S. KOMJATHY, **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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April, 1988

QUESTIONS PRESENTED

1. When the Federal Aviation Administration (FAA) initiates a safety-rule violation case against a pilot it chooses between two disparate tracks of justice: an administrative system, and a judicial system.[1] With the first, it orders the suspension or revocation of his license as punishment for the violation. He or she may then ask the National Transportation Safety Board (NTSB) for a hearing, which is conducted by an administrative law judge, and his decision may be reviewed by the Board.

On the second track, if unable to effect compromise, it initiates a civil suit in district court, where either party has the right to "demand" a jury trial, and the penalty is a money fine.

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[1] As FAA enforcement is rather arcane, it is our opinion that brief background explanations are required for the questions presented. For a detailed explanation and legal history, see the law review article cited at p. 4 n. 4, infra.

Authority for certificate penalties is held to derive from § 609 of the Federal Aviation Act, as amended (FA Act), 49 U.S.C. § 1429(a), which is said to authorize FAA to suspend or revoke whenever it "determines that safety in air commerce . . . and the public interest requires . . ." It says nothing, however, of violations, offenses, rules, sanctions or penalties.

Authority for civil penalties derives from § 901, id. § 1471(a)(1), which provides that "Any person who violates . . . any rule, regulation, or order . . . shall be subject to a civil penalty . . ." Jury trial, from § 903, id. § 1473(b)(1).

Use of these two tracks means that the officials who initiate the case necessarily determine at the start: (1) the kind of trial the accused gets; (2) how he will be punished; (3) whether he can demand jury.

The questions presented are:

A. May Congress, having mandated right

to jury trial and money fines for safety violations, thereafter constitutionally authorize an FAA official to deny the accused those rights, and choose an administrative forum in lieu, which also brings with it a different, and generally conceded harsher form of punishment? Put another way, has Congress in fact ever authorized suspension or revocation as a penalty?

B. Assuming, arguendo, Congress so intended, is general language about air safety and public interest sufficiently specific constitutionally, and under the Administrative Procedure Act (APA), 5 U.S.C. § 558, to support a delegation of authority to impose certificate sanctions?

Alternate. The Circuit Court did not address the issue of whether language about air safety and public interest meets the APA's standards of clarity expressed in 5 U.S.C. § 558 which mandates that an agency may use a penalty only if explicitly auth-

orized by Congress. Thus the alternate question is whether the Court, should it not take jurisdiction, should remand with instructions to do so?

2. FAA has a single certificate action rule, Federal Aviation Regulation (FAR) § 13.19, 14 C.F.R. § 13.19. Like § 609, on which it is based, it speaks only of reinspection of aircraft and reexamination of airmen, qualifications matters, and says nothing of violations or sanctions, which are disciplinary matters. This rule has never been adopted through the APA public notice and comment procedures required by 5 U.S.C. § 553, which would require dismissal. The District of Columbia Circuit, even though it apparently holds it has been, goes on to hold it need not be, as it only paraphrases § 609.

The questions presented are:

A. Has FAR § 13.19 been lawfully adopted in accordance with § 553 public notice and

comment procedures? Or is it exempt?

B. Does an accused have a constitutional right to be told how he will be punished?

3. When prosecuting any safety violation case for which a penalty is sought, FAA officials utilize, or may resort to, three basic policies: (1) to initiate it, they must choose between certificate action or civil penalty; (2) they may use suspension or revocation as punishment in lieu of civil penalty;[2] (3) having started on one track, they may shift to the other--almost always certificate to money fine.

None of these has ever been published in the Federal Register,[3] or promulgated as a rule through public notice and comment.

The questions presented are:

A. Does the APA, 5 U.S.C. § 552(a)(1), require that these policies, as "rules of

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[2] These are dealt with in Question 4.

[3] Which means they also cannot be found in the Code of Federal Regulations.

procedure," "statements of general policy," or "interpretations of general applicability formulated and adopted by the agency," be published in the Federal Register; and for failure so to do require this case to be dismissed because that section provides that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ."?

B. Are these policies "substantive" within the meaning of the APA, § 553, and thus required to be promulgated by notice and comment, failure of which requires dismissal?

Alternate. Although raised, the Circuit Court did not address these issues, which assume, arguendo, authority to make the policies. The only issue is compliance with the APA. We submit this was a denial of justice. If favorable, either would have

been dispositive. Thus the alternate question is whether the Court, should it not take jurisdiction, should remand with instructions to do so?

4. FAR § 13.15, 14 C.F.R. § 13.15, is the civil penalty rule. It misrepresents the law, § 901, which reads: Any person who violates any rule "shall be" subject to a civil penalty. The rule reads: A person "is" subject to a civil penalty. Instead of 901's preemptory command, it reads as if FAA officials have the option not to use civil penalty. This is contrary to that section's plain meaning. It fails to tell the public that officials may shift from license penalty to money fine.

The rule has never been lawfully promulgated through APA notice and comment procedures; and was amended without their use.

The Circuit Court ruled that petitioner lacked standing to challenge this rule.

The questions presented are:

A. Does the rule violate due process and the APA by misrepresenting the law upon which it is based and failing to mention shifts in sanctions?

B. Was the rule and its amendment lawfully adopted pursuant to the APA, 5 U.S.C. §§ 552(a)(1), or § 553?

Alternate. Does petitioner lack standing? Should the Court decide that question, and if favorable, remand these issues to the Circuit Court? *

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* In preparing this petition we were mindful of Mr. Stern's admonition to keep it short. It is, however, near the maximum. In our view, any one of these questions, if decided favorably, would warrant reversal. The difficulty with reducing their number, however, is that on a practical level they are inextricably intertwined, and paint a total picture which we think the Court should see.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

Exceptional Importance 6

I. Congress has never authorized both a judicial and an administrative system of justice for the same safety violations 10

A. Denial of right to jury trial 10

B. Even assuming legitimacy, "public interest" is an unconstitutional grant of power 20

II. FAR § 13.19, the certificate rule never lawfully adopted; is unconstitutionally vague: does not advise citizen of how he will be punished ...26

A. Not lawfully adopted 26

Exempt from rulemaking? 32

B. Right to know penalty 37

III. FAA's three basic enforcement policies have never been lawfully published or promulgated 40

A. Failure to publish 40

B. Failure to promulgate 45

Alternate question: Should the Court Remand 48

IV. FAR § 13.15, FAA's civil penalty rule misrepresents the law, fails to advise that it is an alternative to certificate action; was never law-promulgated or amended; petitioner has standing to challenge it 49

A. Misrepresents the law 49

B. Not lawfully promulgated or amended 51

C. Lack of standing 54

CONCLUSION 58

APPENDIX (separately bound) (Opinion and Judgment of Court of Appeals; Opinion and Order of the National Transp. Safety Bd.), etc. .....a-1 to a-78

TABLE OF AUTHORITIES

Cases: Page

Aiken v. Obledo, 442 F.Supp. 628 (D.C. Calif. 1977) 26,47

Am. Standard, Inc.. v. U.S., 602 F.2d 256 (U.S.Ct. of Claims 1979) 47

Appalachian Power Co. v. Train, 566 F.2d 451 (4th Cir. 1977) 45

Connally v. General Construction Co., 269 U.S. 385 (1926) 24

Chrysler Corp. v. Brown, 441 U.S. 281 (1979) 37

Cubanski v. Heckler, 781 F.2d 1421 (9th Cir. 1986) 37

Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802 (D.C. Cir 1983) 48

Global Van Lines v. ICC, 714 F.2d 1290 (5th Cir. 1983) 14

Go Leasing, Inc. v. National Transp. Safety Bd., et al., 800 F.2d 1514 (9th Cir. 1986) 10,15,25

Grayned v. City of Rockford, 408 U.S. 104 (1972) 24,39

Gulf Oil Corporation v. Hickel, 435 F.2d 440 (1970) 24,51

Hard v. Civil Aeronautics Board, 248 F.2d 761 (7th Cir.), cert. denied 355 U.S. 960 (1957) 15,19

Komjathy, NTSB Order No. EA-2343, SE-6249, July 14, 1986 26

Komjathy v. National Transp. Safety Bd., 832 F.2d 1294 (D.C. Cir. 1987) 17,27,28,32,39,55

Mallen v. Federal Deposit Insurance Corporation, 667 F.Supp. 652 (D. Iowa 1987); Sup. Ct. No. 87-82, July 9, 1987 36

Matlovich v. Secretary of the Air Force, 591 F.2nd 852 (1978) 51

Morton v. Ruiz, 415 U.S. 199 (1974) 44

National Retired Teacher's Ass'n v. United States Postal Service, 430 F.Supp. 141 (D.D.C.), affirmed 593 F.2d 1360 (D.C. Cir. 1979) 47

NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 37,48

Northern California Power Agency v. Morton, 396 F.Supp. 1187 (D.D.C. 1975), affirmed 539 F.2d 243 (D.C. Cir. 1976) 44

Pangburn v. Civil Aeronautics Board, 311 F.2d 349 (1st Cir. 1962) 15,19

Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984) 46

Pharmaceutical Manufacturers Ass'n v. Finch, 307 F.Supp. 858 (D.C. Del. 1970) 37,47

Phillips Petroleum Co. v. Department of Energy, 449 F.Supp. 760 (D.Del.), affirmed 596 F.2d 1029 (Emer.Ct.App. 1978) 47

Pike v. C.A.B., 303 F.2d 353 (8th Cir. 1962) 22,38,51

Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3rd Cir. 1969) 48

United States v. Eaton, 144 U.S. 677 (1892) 21,25

United States v. Grimaud, 220 U.S. 506 (1910) 21,25

United States v. SCRAP, 412 U.S. 669 (1973) 55

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) 54,55

W.G. Cosby Transfer & Storage Corporation v. Froehlke, 480 F.2d 498 (4th Cir. 1973) 57

Wilson v. Civil Aeronautics Board, 244 F.2d 773, cert. denied, 355 U.S. 870 (1957) 15,19,24,25

Constitution and Statutes:

U.S. Const. Amend V (Due Process Clause) 37,38,48,51

Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (1926) 19

Civil Aeronautics Act of 1938, Pub. L. No. 706, 52 Stat. 973 (1938) 15

P.L. 110-223, Sec. 204, 101 Stat. 1519 (1987) 49

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982):

§ 551(4) 45

§ 552(a)(1) 42,45,48,54,57

§ 553 26,27,28,46,47,54

§ 558 21

§ 706 54

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982):

§ 1341(a) 33

§ 1343(f) 33

§ 1429(a) (§ 609) 13,25,32,34

§ 1471(a)(1) & (2) (§ 901) 12,50

§ 1473(b)(1) (§ 903) 12

Regulations:

Department of Commerce, Air Commerce Regulations, § 74(A), (F) (1926) 18

Civil Aeronautics Regulations:

14 C.F.R. § 20.37110 (1938) 18

14 C.F.R. § 408.25 (1952) 36

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1986):

§ 13.15 50

§ 13.19 26,38,52

§ 408.23 (1960) 52,53

§ 408.25 (1960) 29

National Transportation Safety Board:

49 C.F.R. § 821.54(b) 36

Miscellaneous:

Civil Aeronautics, Legislative History of the Air Commerce Act of 1926 19

Federal Aviation Administration Materials:

Compliance and Enforcement Program, FAA Order 2150.3 (1980) 11,12,38,41

N. KOMONS, BONFIRES TO BEACONS, FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926-1938 (1978) 17

Federal Register:

24 Fed. Reg. 10 (1959) 29,52,53

26 Fed. Reg. 10698 (1961) 31

27 Fed. Reg. 5686, 5694-95 (1962) 28,30,53

27 Fed. Reg. 9585-92 (1962) 32,53

Go Leasing, Inc. v. NTSB, United States Court of Appeals for the Ninth Circuit, No. 85-7401, Petitioner's Reply Brief 10

Komjathy v. National Transp. Safety Bd., United States Court of Appeals for the District of Columbia Circuit, No. 86-1444, Petitioner's Reply Brief 32

S. Rep. No. 248, 79th Cong., 2d Sess. (1946) [Legislative History of the Administrative Procedure Act] 21,42

Smith, **FAA Blackjack**, Professional Pilot Magazine at 91, Feb. 1981 4

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DAVID S. KOMJATHY, **Petitioner,**

v.

ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, and NATIONAL TRANSPORTATION SAFETY BOARD, **Respondents.**

PETITION FOR A WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner David S. Komjathy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in this proceeding November 13, 1987, order denying rehearing entered February 1, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 832 F.2d 1294, and is reprinted in the accompanying separate appendix. (a-32)

The opinion and order of the National Transportation Safety Board (NTSB) has not been reported. It is reprinted in the appendix (a-19), as is the administrative law judge's oral initial decision, which it affirmed. (a-6)

JURISDICTION

The Federal Aviation Administration, on April 4, 1984, after having earlier served a Notice of Proposed Certificate Action on

May 23, 1983, initiated an enforcement action against petitioner, under 49 U.S.C. app. § 1429(a), by ordering a 180-day suspension of his private pilot license as punishment for certain alleged safety violations.(a-1) He appealed to the NTSB, under § 1429(a), and hearing was held by an administrative law judge on September 20, 1985, who upheld the suspension, with the final Board order, also affirming, entered July 14, 1986. Mr. Komjathy petitioned the Court of Appeals for the District of Columbia Circuit for review, under 49 U.S.C. § 1486. That court entered a judgment and opinion affirming the NTSB order on November 13, 1987; an order denying a petition for rehearing was entered February 1, 1988.

The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations directly relevant to the issues are here listed, with the pertinent portions of their text set forth in the appendix:

Administrative Procedure Act, 5 U.S.C. §§ 551-559, 702-706 (1982): §§ 551(4), 552(a)(1), 553, 558, 706;

Federal Aviation Act of 1958, as amended, 49 U.S.C. app. §§ 1301-1552 (1982): §§ 1429(a), 1471(a)(1) & (2), 1473(a) & (b)(1);

Federal Aviation Regulations, 14 C.F.R. Parts 1-199 (1986): §§ 13.15, 13.19; §§ 408.23 and 408.25 (1960).

STATEMENT OF THE CASE

The issues petitioner raises go to the Federal Aviation Administration's lack of authority to bring a safety violation case as a certificate action, its failure to comply with the Administrative Procedure Act, remedy for any failure of which is

dismissal, and related due process issues.[4] No issue turns on any fact involved in the incident. We briefly describe it, however, as a frame of reference. A number of salient facts of general public notice support the legal issues, which we present in the reasons section.

Mr. Komjathy, a maintenance supervisor for the New York State Thruway, and private pilot, on November 26, 1982, took off lawfully under visual flight rules (VFR) conditions from the Schenectady, New York, Airport. While still in its control zone (within five miles of the airport) a snow squall hit. Snow, unlike rain, cuts visibility to almost nil. He immediately radioed

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[4] For an indepth explanation and history of FAA safety enforcement, see Smith, **FAA PUNITIVE CERTIFICATE SANCTIONS: THE EMPEROR WEARS NO CLOTHES; OR, HOW DO YOU PUNISH A PROPELLER?**, 14 Transp. L.J. 59-100 (1985) [hereinafter "Emperor"]; Smith, **FAA: Illegal disciplinarian?**, Aviation Digest at 26, Sep. 1987, and Smith, **FAA Blackjack**, Professional Pilot Magazine at 91, Feb. 1981.

tower for permission to return. Because the field was now under instrument flight rules (IFR), the tower told him to contact Albany approach control. They gave him certain directions which he either didn't hear or was unable to follow. A non-instrument rated pilot, he did the only sensible thing he could, dropped down low to keep contact with the ground, and flew back and forth across the airport until the controllers figured out they should let him land.

As a result, FAA charged him with flying in less than weather conditions required for VFR flight and contrary to air traffic control (ATC) instructions. Following appropriate notice, FAA, on April 4, 1984, ordered his license suspended for 180 days, strictly as punishment for violation of related air-traffic rules.

He asked the NTSB for a hearing. Counsel moved to dismiss, raising the same issues as here. The Board denied the motion, and

petitioner filed an interlocutory appeal with the District of Columbia Circuit, also denied, but on grounds no final order had been issued. Hearing was held September 20, 1985. On the advice of counsel, with petitioner's full knowledge and consent, he did not contest the charges. The administrative law judge (ALJ) upheld the suspension. Appeal was taken to the full Board, which affirmed.

REASONS FOR GRANTING THE WRIT

Exceptional Importance

One million American citizens, pilots, mechanics, flight engineers, air-taxi operators, repair stations and air carriers hold certificates issued by the Federal Aviation Administration. We estimate that at least 250,000 of them rely on their license for their livelihood. Tens of thousands of other jobs are dependent on companies with FAA operating certificates. In 1979, the last public statistics we are

aware of, 4,000 safety enforcement cases were closed by FAA. About 2,400, or 60%, the vast majority of them pilots, had their licenses suspended or revoked for periods of up to one year, strictly as punishment for the violation of safety regulations. Perhaps 700 relied on their licensees for their livelihood, not including businessmen who needed to fly for business travel. The other 40% were settled by civil penalty. Emperor at 60.

For private and student pilots, punitive certificate actions comprised 87% of the total. Ninety-nine percent of these were first offenses and generally involved inadvertent violations of traffic and other technical safety rules. Id. One can imagine what would happen if 87% of auto cases resulted in license suspension. Recently FAA officials have increased emphasis on certificate actions, even for professionals, rather than settle with a compromise money

fine, so today the figures could be considerably higher.

It is plain fact that no statute, no regulation exists which so much as hints that FAA may suspend or revoke a pilot's license as penalty for a safety violation. Put another way, this means that a lawyer unfamiliar with aviation, if asked to find out how pilots are punished for air-traffic violations, cannot find the answer in the United States Code or the Code of Federal Regulations (CFR). This is remarkable, to say the least.

What is also remarkable, and discernable through review of the Federal Register, is that FAA officials, in the agency's three decades of existence, have never, through APA notice and comment procedures, involved the public in the making of the few procedure rules they do have.[5]

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[5] Emperor at 82-98, traces this regulatory history.

In 1926, seminal year of federal regulation of aviation, Congress, for enforcement, considered both a criminal system and a civil penalty system with right to jury trial. It chose the latter. Neither then, nor at any time since has any agency ever asked for authority to set up a parallel certificate-sanction system of justice, no legislator has ever introduced a bill proposing such, no committee of Congress has ever held hearings on the subject.

The reported cases which provide the only foundation for the agency's claim of authority are all based on a gross error of fact: belief the certificate system was authorized by Congress in 1938, when in fact officials started it in 1926, right in the face of Congress' single choice, civil money penalties with jury trial.[6]

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[6] A detailed exposition of this, and how enforcement works, may be found in Emperor at 59-82.

I. FAA's claim that Congress authorized both a judicial and an administrative system of justice for the same violations, which allows it to deny right to jury trial, is without foundation.

A. Denial of right to jury trial. To raise as an issue whether Congress, having mandated right to jury trial and a money fine for air-safety violations, may thereafter constitutionally authorize a federal agency to deny those rights, at worst, must appear frivolous, at best, profoundly confused.[7] Such a situation would obviously violate the most fundamental precepts of our democracy and system of jurisprudence. Yet this is precisely what FAA's contention amounts to. It is spelled out by plain lan-

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[7] Although argued (Petitioner's Reply Brief at 18, Komjathy v. NTSB, United States Court of Appeals for the District of Columbia Circuit, No. 86-1444), perhaps this is why the circuit court failed to address this conundrum. Nor did the Ninth Circuit in Go Leasing, Inc. v. NTSB, 800 F.2d 1514 (9th Cir. 1986) (Petitioner's Reply Brief at 17, Go Leasing, Inc. v. NTSB, United States Court of Appeals for the Ninth Circuit, No. 85-7401).

guage in the agency's enforcement manual: "When violations occur, firm action must be taken. . . . Impose punitive sanctions, after the fact, to deter violations (e.g., certificate actions, civil penalties); . . ." Or this: "If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate action." Compliance and Enforcement Program, FAA Order 2150.3, ¶ 203.c.(1)(b) and ¶ 203.c.(2) at pages 13-14 [hereafter 1980 Handbook]. (See Exhibit A, a-72, which contains more examples.)

It is important to note that the manual carefully distinguishes qualifications matters from punitive purposes: "[Another purpose is to] [a]chieve remedial purposes (e.g., certificate suspension pending demonstration of qualifications; revocation for lack of certificate qualifications)."

Id. ¶ 203.c.(1)(c). (a-73).[8]

Authority for civil penalties and that claimed for certificate penalties provide a marked contrast:

> (a)(1) **Any person** who violates (A) any provision of subchapter III, IV, V, VI, or XII of this chapter . . . or **any** rule, regulation, or order issued thereunder . . . **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation . . .
>
> (2) Any civil penalty may be compromised . . .
>
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>
> (b)(1) Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . Such proceedings shall conform as nearly as may be to civil suits in admiralty . . . **either party may demand trial by jury** of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. . . .

Federal Aviation Act of 1958, as amended (FA Act), §§ 901 and 903, 49 U.S.C. app. §§ 1471(a)(1) and 1473(b)(1) [emphasis added]. What could be plainer? Certificate action:

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[8] See Emperor at 61-63.

> The [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. **If, as a result of** any such reinspection or reexamination, or **if, as a result of** any other investigation made by the [Administrator], **he determines that safety in air commerce or air transportation and the public interest requires**, the [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. . . . Any person whose certificate is affected by such an order . . . may appeal [for hearing] . . . to the National Transportation Safety Board . . .

FA Act § 609, id., § 1429(a) [emphasis added]. FAA contends, and several courts of appeal have so held (cases discussed, infra), that § 609 constitutes a broad grant of power to the Administrator to amend, modify, suspend or revoke a certificate whenever he "determines that safety in air commerce or air transportation and the public interest requires" it.

Several arguments undercut this claim:

(1) If one parses § 609 it is to be seen that the air-safety-public-interest language is lifted out of context. It is not a broad grant to use power but a condition subsequent to first reinspecting, reexamining or investigating ("if as a result of").[9] In actuality it offers the Administrator a way to justify a decision not to suspend or revoke.

(2) As we have seen, FAA carefully distinguishes between suspensions used for qualifications purposes and those used for punishment. If Congress intended to use § 609 as a parallel system of justice for violations, why would it use language relevant to qualifications, reinspection and reexamination, but fail to include such

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[9] "A general congressional exhortation to go forth and do good, without more, is not a proper foundation for the sound development of administrative law." Global Van Lines v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983); see also Emperor at 73.

obvious terms as violations, offenses, regulations, sanctions or penalties? The premier maxim of statutory interpretation, expressio unius est exclusio alterius, applies.

(3) Prior to Go Leasing, supra, and the instant case, in only three reported cases were certificate sanctions challenged: Wilson v. C.A.B., 244 F.2d 773 (D.C. Cir.), cert. denied, 355 U.S. 870 (1957); Hard v. C.A.B., 248 F.2d 761 (7th Cir.), cert. denied, 355 U.S. 960 (1957); Pangburn v. C.A.B., 311 F.2d 349 (1st Cir. 1962) [hereafter referred to individually or as the Triad]. All were airline captains. As they readily reflect, Wilson was the touchstone.[10] The challenge there was to the Civil Aeronautics Act of 1938, ch. 601,

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[10] Which makes it indeed puzzling as to why the District of Columbia Circuit in the instant case cited only Pangburn, 832 F.2d at 1296;. Pangburn clearly relies on Wilson. 311 F.2d at 354.

§ 609, 52 Stat. 973, 1011 (1938 Act). (That § 609 was pretty much the same as the present, except for the transfer of power from the Civil Aeronautics Board to the new Federal Aviation Agency in 1958.) The District of Columbia Circuit held, that "[b]y resting suspension on a Board determination that the 'interest of the public so requires,' Congress conferred broad discretionary authority upon the Board." 244 F.2d at 774; see also Emperor at 72. In a decision barely one-page, the court did not explain why § 901 was not exclusive. 244 F.2d at 774.

Lacking plain statutory language to support suspension penalties with administrative trial in lieu of right to jury, the Triad, especially Wilson, has always been the only such source for FAA's claim. The District of Columbia Circuit, however, adds a new one. It contends that NTSB is plainly authorized to review FAA suspensions--

citing statutes. 832 F.2d at 1297. That is undoubted, but it begs the salient question: For what purpose or purposes has Congress authorized FAA to suspend or revoke certificates? And would Congress knowingly authorize executive branch officials to deny right to jury trial?

The root problem with the Triad is that those cases are all based on a gross error of fact: this so-called "deterrent" sanction system of justice did not start in 1938, authorized by the 1938 Act, as the decisions show those courts believed, certificate penalties were instituted in 1926. See Emperor at 74-77 (which explains in detail how this happened).[11] Moreover,

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11 "[I]n October 1929, the [Aeronautics] Branch gradually began to deal more severely with violators. . . . [It] turned to suspensions as a primary enforcement tool. At the same time revocations were being handed out with greater frequency. . . ." **N. KOMONS, BONFIRES TO BEACONS, FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926-1938**, at 107-08 (1978) (official history).

the government never argued that they started in 1938, but in their brief pointed out it was indeed 1926. See Emperor at 70 n. 75. But opposing counsel and the Wilson court failed to pick up on this and continued to focus on 1938.

The issue before these courts was congressional intent. How can the Triad cases have any validity when based on such a fundamental mistake? Any argument about that intent must be conducted in the time-frame of 1926. In fact, the government itself argued that it was the Air Commerce Act of 1926, § 3(f), 44 Stat. 568, 570 (1926), from whence came their authority. See

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The then extant certificate penalty rule read: "Pilots' and mechanics' licenses will be suspended or revoked for -- (A) Violating any provision of the air commerce act of 1926 or these regulations. . . . (F) Violating air traffic rules." Department of Commerce, Air Commerce Regulations, § 74 (A) and (F) (1926); see also 14 C.F.R. § 20.37110 (1938) (seminal edition of the C.F.R. in which this rule was codified for the first--and last--time).

Emperor at 75-76, and 74 n.91. But if conducted in that time-frame the government's position must fail. It is crystal clear that the only enforcement system chosen in 1926 was civil money penalties with right to jury trial.[12] **CIVIL AERONAUTICS, LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926**, at 59 (1928) (hereafter 1926 History); see Emperor at 67-68.[13]

Thus the real question is: On what basis would Congress, in 1926, for violations of air-safety rules, carefully choose a civil-money-penalty system of justice over a criminal system, mandate right to jury trial in district court, then at some point thereafter, authorize a parallel system of administrative justice with a certificate

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[12] See Air Commerce Act of 1926, ch. 344, § 11(b), 44 Stat. 568, 574.

[13] Is justice served when FAA, and appeals courts, continue to cite Wilson, Hard and Pangburn, without confronting the fact they are based on such obvious and fundamental error?

penalty, using only vague language about air safety and public interest, with no bill introduced or hearings held to support it? FAA never answers this question.

The irony of its position may be seen in this conundrum: Assume a gross safety violation by a pilot who either never had a license or had it revoked; without a certificate to act against, the only way FAA can prosecute him is by means of the civil penalty system. Thus the truly bad actor is assured of his right to jury and, at worst, a money fine collectible only by levy.

B. Even assuming, arguendo, that Congress intended to grant broad authority to use suspension and revocation for whatever is in the "public interest," it is an unconstitutional delegation of power.

Even if the above problems with § 609 could be overcome, its language about air safety and public interest is constitutionally inadequate as a touchstone of power. It is fundamental that Congress may not delegate its authority to create benefits

or sanctions. United States v. Eaton, 144 U.S. 677 (1892), United States v. Grimaud, 220 U.S. 506 (1910). This principle finds expression in the APA:

> (a) This section applies, according to the provisions thereof, to the exercise of a power or authority.
> (b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

5 U.S.C. § 558(a) & (b). Its history:

> This provision, limiting administratively imposed requirements to the authority granted and delegated, is designed to afford statutory recognition for the basic rule of law, embodied in judicial decisions. The creation of penalties or benefits is exclusively the province of Congress.
>
> . . . .
>
> [It] means that agencies may not undertake anything which statutes or other adequate sources of authority (such as treaties) do not authorize them to do. Where these sources are specific in the authority granted **no additional authority may be assumed. . . . Sanctions in the way of penalties or relief must be identified and authorized by law, and where authorized they must in any case apply in the factual situation presented.**

S. Rep. No. 248, 79th Cong., 2d Sess. 34 and 274 (1946) [emphasis added]. "No addi-

tional authority may be assumed" is another way of stating the maxim: Expressio unius est exclusio alterius. Congress chose civil money penalties with right to jury trial. Where does the FA Act say anything else? "Factual situation presented." The only factual situation § 609 talks about is "reinspection" and "reexamination," qualifications matters.

Assuming, arguendo, FAA has jurisdiction to impose punitive suspensions, specific authority presents a separate hurdle. At the least, this mandate imposes a standard of clarity for what sanctions Congress has authorized, and what it has not. What else could "must be identified" mean?

Congress wrote §§ 901 and 903 with a high degree of clarity. Where in the FA Act is there a hint that suspension or revocation may be imposed as a penalty?

The landmark FAA case of Pike v. C.A.B., 303 F.2d 353, (8th Cir. 1962), is instruc-

tive. A commercial pilot, Pike was charged with giving flight instruction when he did not possess an instructor's certificate. The court reversed revocation of his license because nothing in the statutes or FAA regulations specifically forbade him from giving instruction. Blackmun, J.:

> This lack of specificity and completeness of the Regulations disturbs us for this case. Because of this we are disinclined to reach a result, drastic in its application to the individual concerned (whether it be Pike or any other), which deprives an airman of admitted experience and ability his primary means of livelihood. [Citing cases] We prefer to have, where a result of that magnitude is to be forthcoming, a statute or regulation which is more positive and definite than those here involved.

Id. at 357. We doubt if the court meant that magnitude of the penalty would determine the legal principles, but a 180-day suspension of a private pilot who owns his own plane is hardly insubstantial.

It is axiomatic that a statute is unconstitutionally vague if persons of "common

intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). How can layman or lawyer read § 609 and obtain from it a legislative mandate for license penalties? "Vague laws offend several important values." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). "There are, of course, instances where the plain language of a regulation [or statute] simply does not 'bear the construction' furnished by the officer or agency involved. Such a case was Pike v. CAB . . ." Gulf Oil Corporation v. Hickel, 435 F.2d 440, 445 (D.C. Cir. 1970).

Wilson held that "[b]y resting suspension on a Board determination that the 'interest of the public so requires,' Congress conferred broad discretionary authority on the Board." 244 F.2d at 744. By its own terms, even assuming, arguendo,

this were true, on its face it violates the standard of clarity required by § 558 and the principles laid down in Grimaud and Eaton, supra. It says, not that Congress delegated authority to impose suspension and revocation as punitive sanctions, but that the Board (then the C.A.B.) could suspend for whatever it deemed to be in the public interest. In other words, the choice was the agency's and, ergo, it, not Congress, created the sanction, which would make it an unconstitutional delegation.[14] Even NTSB recognizes the obvious, but not its legal relevancy:

> "This statute [§ 1429(a)] does not explicitly state that the Administrator may suspend a certificate for violations of the FAR;; however, a prior version of this section which contained similar

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[14] Wilson, of course, addressed none of this. Again, it is puzzling why the court below failed to do so; these issues were prominently raised. Petitioner's Brief at 36-40, Komjathy v. NTSB, supra, n. 7. Go Leasing, supra, held that § 558 had been complied with, but offered no analysis. 800 F.2d at 1526.

> langauge [sic] has been construed to authorize the suspension of an airman license for violations of safety regulations. 4/ In Wilson, the court rejected the argument that the then §609 which provided for the suspension of an airman certificate "if the interest of the public so requires" did not authorize a suspension for the violation of regulations.

Komjathy, NTSB Order No. EA-2343, SE-6249, July 14, 1986. (a-24-25)

II. FAA's certificate rule, FAR § 13.19 has never been lawfully adopted through APA public notice and comment procedures; it is unconstitutionally vague--does a citizen have a constitutional right to be told how he is to be punished?

A. Not lawfully adopted. FAR § 13.19, 14 C.F.R. § 13.19, is FAA's certificate suspension and revocation rule. The APA, 5 U.S.C. § 553, requires that "substantive" rules be adopted through formal public notice and comment procedures (Notice of Proposed Rule Making--NPRM). The rule is substantive and has not been so adopted. This requires dismissal. Id. § 706; Aiken v. Obledo, 442 F.Supp. 628, 650 (D.C. Calif. 1977) ("The reviewing court shall--

. . . hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . .").

The Circuit Court holds that the rule does not require formal adoption because it is not substantive as it merely paraphrases § 609 on which it is based. 832 F.2d at 1296-97. Evidently straddling both sides of the issue, the Court also appears to hold that, even so, rulemaking formalities were in fact complied with--and that petitioner agrees. Id. at 1297 n. 1. This is mistaken: petitioner does not in any manner agree.

Whether § 553 has been complied with is purely a factual question. Rulemaking requirements are well understood. First an NPRM in the Federal Register is required which includes: (1) time, place, and nature of the proceedings; (2) reference to the legal authority under which the rule is proposed; (3) its terms and substance. 5 U.S.C. § 553(b). In other words, the agency

explains that it is proposing a rule that will govern certificate actions and explains how it will work. After this notice, it collects comments sent in by interested persons to the docket number and address specified in the NPRM, considers and summarizes them, adopts a concise general statement of the rule and its purpose and, along with the rule as finally adopted, publishes this material in the Federal Register. Id. § 553(c)&(d).

The Circuit Court cites 27 Fed. Reg. 5694 (1962) as the required NPRM. 832 F.2d at 1297 n. 1. This notice cannot under any circumstances so qualify. It was part of a major rules recodification project carried out in 1961-62. Nothing in it refers to any proposal to create a certificate rule, much less explain its purpose, legal basis, or invites the public to comment on how it should work, etc. And in order to further comply one would have to cite to an addi-

tional Federal Register notice which contained a summary of the public comments, the rule as finally adopted, and so forth. Id. § 553(c)&(d). This was not done: no such notice was ever published.

The certificate rule at the time of this notice, 1962, was codified as 14 C.F.R. § 408.25, see 24 Fed. Reg. 10 (1959). Neither did this 1959 notice make any pretense of being an NPRM proposing a certificate rule (or any other--if it had, then the focus would be on 1959, not 1962); it simply announced that the new Federal Aviation Agency was adopting the entire set of enforcement rules it set forth. Nothing was said as to why § 553 requirements were not followed. See, Emperor at 87-90. The purpose of the recodification project was to change the old Part 408 numbers, and others, which were a carryover from the Civil Aeronautics Administration (CAA--metamorphosed into FAA).

The notice relied upon by the court below plainly states in its preamble:

> "Interested persons are invited to participate in the proposed recodification . . .
>
> The proposal is part of the program of the Federal Aviation Agency **to recodify its regulatory material** . . . The object of the new chapter is to restate existing regulations, **not to make new ones.** The pertinent provisions have been freely reworded and rearranged, **subject to every precaution against disturbing existing rights, privileges, duties or functions.** . . .
>
> . . . .
>
> **No substantive change has been made in the regulations,** the purpose of the recodification project being simply to streamline and clarify present regulatory language and to delete obsolete or redundant provisions. . . .

27 Fed. Reg. 5686 (1962) [emphasis added]. This notice referred to an earlier one, 26 Fed. Reg. 10698 (1961), which first announced the project. Id. It said:

> **This notice proposes no substantive changes in the regulations and is not a notice of proposed rule making subject to the Administrative Procedure Act.** . . . The program will not result in any new regulatory requirements.
>
> Most of the current rules and regulations have been inherited from predecessor organizations and were promulgated by them over a period of

more than twenty years. . . .

. . . .

The recodified system will serve to assure consistency in style, format and approach in any substantive revision of the actual requirements of the regulations that may be undertaken after the recodification program is completed. . . .

. . . .

With minor exceptions, the regulations included in the outline are those that were in effect January 1, 1961. . . . In addition, **rewritten regulations will be published under notices of proposed rule making** in the FEDERAL REGISTER and all interested persons will be invited to submit comments and recommendations on the form and manner of their inclusion in the recodified structure.

Id. 10698-99 [emphasis added]. It should be noted that this notice proposed to codify enforcement rules as Part 15. Yet another notice, apparently the last, changed Part 15 to the present Part 13. It stated:

A part of the comments received recommended specific substantive changes to the regulations. Although some of these recommendations might, upon further study, appear to be meritorious, **they cannot be adopted** as a part of the recodification program. The purpose of the program is simply to streamline and clarify present regulatory language and to delete obsolete or redundant provisions. **To attempt substantive changes in**

> **the recodification of these regulations** (other than minor, relaxatory ones that are completely noncontroversial) would delay the project and **would be contrary to the ground rules specified for it in the FEDERAL REGISTER** on November 15, 1961 (26 F.R. 10698), and Draft Release 62-27. However, all comments of this nature will be preserved and considered in any later substantive revision of the affected parts.

27 Fed. Reg. 9585 (1962) [emphasis added].

Under no circumstances has FAR 13.19 ever been promulgated through public notice and comment procedures. How the District of Columbia Circuit concluded otherwise is difficult to understand. All of these Federal Register notices, along with appropriate quotations, were cited to it for reference. (Petitioner's Reply Brief at 10-11, Komjathy v. NTSB, supra.)

Is 13.19 is exempt from rulemaking? The Circuit Court asserts that the rule "does no more than repeat, virtually verbatim, the statutory grant of authority in 49 App. U.S.C. app. § 1429(a) [§ 609] for the ordering of such suspensions." 832 F.2d at

1296. This manifestly is not correct. It delegates to specific agency officials the Administrator's authority to issue suspension and revocation orders. These officials are not designated by § 609. The need to formally delegate is required by FA Act, § 301, 49 U.S.C. 1341(a) ("The Administrator shall be responsible for the exercise of all powers and the discharge of all duties of the Administration, and shall have authority and control over all personnel and activities thereof."), and § 302, id. § 1343(f) ("The [Administrator] is authorized . . . to define their authority and duties . . .").

Since Congress has delegated to the Administrator enormous responsibility to make rules (laws) on its behalf and issue orders that often determine the right to hold a job, or continue in business, surely it is a matter of substantive public concern to whom he delegates this authority. A clerk?

Implementing § 609, the rule lays out a scheme of procedural due process. The statute instructs the Administrator "except in cases of emergency, [to] provide the holder of such certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended or revoked." 49 U.S.C. app. § 1429(a). It does not specify how the charges are to be presented, how process is to be served, how the accused shall answer.

The rule offers a number of options for the accused. By what means does the agency serve the notice of proposed certificate action? It doesn't say. Service of process is one of the most fundamental of procedural due process concerns. Is it to be personal service? Certified mail? What happens if the accused is out of the country and someone else signs for it? The holder only has 15 days to respond. Do not "interested persons" of the aviation public

have the right to comment on whether it should be 10 days, 20 days, 30 days? The informal conference, or option to write a letter, is FAA's interpretation of 609's command to provide an opportunity to answer. This is the agency performing a legislative function, filling in details.

What the rule does not say is as significant as what it does. The accused has an automatic stay of any order, unless "the [Administrator] advises the . . . Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order . . ." When an FAA official declares an emergency pilots are instantly put out of their job, businesses closed down with dozens or hundreds of employees out of work. Yet 13.19 does not specify how that advice is to be given, or in what period of time.[15]

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[15] This lack of detail allows an FAA official to extend the 60-day limit in

Where are criteria establishing what constitutes a threat to air safety?[16] Should the official have to file an affidavit, or otherwise explain his drastic action? Now, all he does is recite the litany that the order is in the interest of air safety and the public, without having to say why.

The Circuit Court's holding that 13.19 does no more than paraphrase § 609 does not

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which the Board must decide the case, by first serving the order on the holder to shut him down, which he always obeys on the spot, then delaying his letter of advice, which is a separate document. Under NTSB rules the 60 days only start running "as of the date when the Administrator's written advice of the emergency character of his order has been received . . ." 49 C.F.R. § 821.54(b). This same issue is raised in Mallen v. Federal Deposit Insurance Corporation, 667 F.Supp. 652 (D.Ia. 1987), Sup. Ct. No. 87-82, July 9, 1987.

[16] Although FAA has no emergency rule as such, CAA, its predecessor, did: "[An emergency will be deemed to exist [i]n the event the condition or conduct of a certificate holder is such as to indicate immediate danger of injury to a person or damage to property, and the immediate suspension of the certificate might reasonably be expected to avert such injury or damage . . ." 14 C.F.R. § 408.25 (1952).

comport with the facts. The rule, indeed, does do that, but it also affects individual rights and obligations by legislating a substantive scheme of procedural due process, the test set out in Chrysler Corp. v. Brown, 441 U.S. 281, 301-04 (1979). "Once an agency rule or regulation has been determined to be substantive, it nevertheless will not have 'the force and effect of law' unless its promulgation conforms 'with any procedural requirements imposed by Congress.' [Citing Chrysler Corp., id. at 303.]" Cubanski v. Heckler, 781 F.2d 1421, 1425-26 (9th Cir. 1986). The rule has never been lawfully promulgated. The requirements of the APA were designed to assure fairness and mature consideration of rules of general application. NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); see also Pharmaceutical Mfrs. Assoc. v. Finch, 307 F.Supp. 858 D. Del. 1970).

B. Right to know the penalty. FAR §

13.19 violates due process. Petitioner (and the public) has a right to be told how FAA will punish him for a safety violation. FAA interprets § 609 to authorize suspension and revocation for two entirely separate purposes: (1) suspension until the holder demonstrates he is qualified, revocation if it turns out he is not; (2) purely as punishment for the violation of a safety rule. 1980 Handbook, ¶ 203.c.(1)(b)&(c) and ¶ 205.b.(3)&(4) at pages 13 and 15. (a-72-73) Yet the rule warns only of its use for qualifications matters (reinspection and reexamination). Failure to tell the public about punitive suspensions violates the APA and the most basic concepts of substantive due process. Pike v. C.A.B., supra.

Whether § 609, through vague language about public interest, authorizes suspension penalties is an entirely separate issue from whether the agency (which, after all, has complete control over what it

publishes as regulations) has lived up to its responsibilities in telling the public what its enforcement policies are. "Vague laws offend several important values." Grayned v. City of Rockford, supra, 408 U.S. at 108. Why would this important regulatory agency not tell the persons it regulates their licenses are at risk for safety violations?

The Circuit Court appears to say that the rule is adequate as long as it repeats § 609's public interest language, and that the public ought to be able to figure out that this includes suspension and revocation as penalties. 832 F.2d at 1296. This is a remarkable position. The reasoning behind it is rather unclear. What is clear, is that nothing can change the fact that there is neither statute nor regulation which so much as hints that in addition to the civil-money fine suspension and revocation are also used as penalties.

III. Three basic policies apply to any FAA safety enforcement case: (1) right to choose the track of justice, administrative or judicial; (2) right to impose a certificate penalty; (3) right to shift from one track to the other. Not one has ever been published in the Federal Register or, although substantive, promulgated through public notice and comment procedures.

A. Failure to publish. FAA policies: (1) direct agency officials, when initiating any safety violation case, to choose between the § 609 administrative track of justice and the § 901 civil-penalty-jury-trial track; (2) explain that certificate suspension or revocation, may be used as punishment in lieu of civil penalties; (3) authorize officials, in their discretion, having initiated one track, to shift over to the other (almost always certificate to civil money fine).

All three may be found in the agency's enforcement manual. (1) "Formal legal actions are undertaken to: . . . Impose punitive sanctions, after the act, to deter violations (e.g., certificate action, civil

penalties) . . ." 1980 Handbook, supra, ¶ 203.c.(1)(b) (a-73); (2) "If monetary sanction against any certificate holder is insufficient to get and keep their attention, do not hesitate to use certificate." Id. ¶ 203.c.(2) (a-74); see also ¶ 205.a. & b. (a-75-78) Policy No. 3 reads:

> Shift in sanctions Ordinarily it will not be FAA policy to withdraw one remedy, after it has been commenced, to pursue another, although circumstances may arise in which such action is appropriate. An example where such action would be appropriate is when counsel has commenced certificate action against a pilot and thereafter learns that the pilot uses an aircraft in business or a profession and that the proposed suspension would constitute a sanction much more severe than is warranted by the violation. Contrary situations will also occur.

Id. ¶ 1202.a.(4) at page 163.[17]

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[17] The manual does not explain what happens to the pilot's right to jury trial. Had agency officials initiated the case as a civil penalty instead, the accused would have been in a position to say, "I didn't do it, I won't pay, sue me," and then would have been able to "demand" a jury trial. Nor does it, of course, explain how, once having started the case as a civil penalty, with its absolute right to jury trial, the

Congress has mandated in the APA that virtually every agency policy which might somehow impinge on the public be published in the Federal Register or promulgated through formal procedures. Senator Pat McCarran, its sponsor, called that act

> a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government. It is designed to provide guaranties of due process in administrative procedures.

S. Rep. No. 248, 79th Cong., 2d Sess. 298 (1946). The act provides that each agency shall "publish in the Federal Register for the guidance of the public-- . . . [inter alia] rules of procedure, statements of general policy, or interpretations of general applicability formulated and adopted by the agency . . ." 5 U.S.C. § 552(a)-(1). Unless the person has actual and time-

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FAA can deny that right and switch to a certificate action -- "contrary situation". **Is it not incumbent upon FAA to explain this conundrum?**

ly notice, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. . . ." Id. This is a legislative exclusionary rule, the only remedy should an agency violate the act.

The three policies fit one or more of the named categories, arguably all three. FAA has never contended otherwise. Since no reference to any one of them is to be found in the FA Act, they are clearly interpretations of §§ 609 and 901, formulated and adopted by the agency and, obviously, of general applicability. FAA has never claimed that any one of them has ever been published in the Federal Register. Never claimed they do not apply, or would not be available to resort to, in petitioner's case.[18] Since they do apply, fall within

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[18] FAA's defense seems to be that since they are contained in the enforcement

one or more of the named categories, and have never been published, the federal courts must follow Congress' mandate and dismiss.

The only place official reference to these FAA policies may be found is in agency manuals. The Court has specifically held this not to be sufficient: APA publication requirements must be followed. Morton v. Ruiz, 415 U.S. 199 (1974). "The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby." Northern California Power Agency v. Morton, 396 F.Supp. 1187, 1191 (D.D.C. 1975), affirmed 539 F.2d 243 (D.C. Cir. 1976). "Any agency regulation that so directly affects preexisting legal rights or

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manual and it is available to the public they need not be published. This argument is wholly without merit.

obligations . . . indeed, that is 'of such a nature that knowledge of it is needed to keep the outside interests informed of the agency's requirements in respect of any subject within its competence,' is within the publication requirement [of the APA]." Appalachian Power Co. v. Train, 566 F.2d 451, 455 (4th Cir. 1977).

B. Failure to promulgate. Each of the three policies constitutes a "rule" as defined by the APA: "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . . 5 U.S.C. § 551(4). The basic question, however, is whether or not these "rules" are "substantive" within the meaning of id. § 553(d) ("The required publication of a substantive rule shall be made . . .") and § 552(a)-

(1)(D) ("substantive rules of general applicability adopted as authorized by law"). If so classified, the APA mandates that they be adopted pursuant to formal procedures which require, inter alia, notice of proposed rulemaking published in the Federal Register with a statement of basis and purpose, opportunity for public comment, and publication of the rule as finally adopted. Id. § 553(b).

The policies are clearly substantive, they affect a property right. See Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984). Careful search of the Code of Federal Regulations and Federal Register since 1958 reveals no NPRMs or rules as finally adopted for any of the three. That failure is an absolute bar to this case: "[A] person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5

U.S.C. § 552(a)(1). "The reviewing court shall--hold unlawful and set aside agency action . . . found to be-- . . . not in accordance with law." Id. § 706(2)(A); Aiken v. Obledo, supra, 442 F.Supp. at 650. "The purpose of requiring a statement of the basis and purpose is to enable courts, which have the duty to exercise review, to be aware of the legal and factual framework underlying the agency's action." Am. Standard, Inc. v. U.S., 602 F.2d 256, 269 (U.S.Ct. of Claims 1979).

Section 553(b), was meant to provide an opportunity for public participation in the rule making process when that process results in the promulgation of rules or regulations of substantial impact. Pharmaceutical Mfrs. Assoc. v. Finch, 307 F.Supp. 858 (D. Del. 1970); Phillips Petroleum Co. v. Dep't of Energy, 449 F.Supp. 760 (D. Del.), affirmed 596 F.2d 1029 (Emer.Ct.App. 1978); National Retired Teachers Ass'n v.

United States Postal Service, 430 F.Supp. 141 (D.D.C.), affirmed 593 F.2d 1360 (D.C. Cir. 1979); see also NLRB v. Wyman-Gordon Co., supra, and Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740 (3rd Cir. 1969). "Any claim of exemption from APA rulemaking requirements 'will be narrowly construed and only reluctantly countenanced.' [Citing cases]" Environmental Defense Fund, Inc. v. Gorsuch, 713 F.2d 802, 816 (D.C. Cir. 1983).

Alternate question. These issues of publication and promulgation were prominently raised in petitioner's brief below. FAA has never contested the existence of these policies, that they fit the § 552(a)(1) categories, or claimed they do not apply to petitioner's case. They have not, because it is impossible to suggest otherwise. Yet the District of Columbia Circuit failed to address both issues, which would have been dispositive of the case--and which,

assume, arguendo, full authority to make the policies.

We submit that this failure was a denial of justice, and ask the Court, should it not take jurisdiction of this case, to remand it to the Circuit Court with instructions to decide the two issues.

IV. FAR § 13.15, the civil penalty rule, violates due process: it was purposefully amended to misrepresent the law; it fails to advise the citizen that it may be resorted to as an alternative to certificate action; neither original rule nor amendment were promulgated in accordance with APA procedures. The APA's "resort to" language provides petitioner with standing.

A. FAR § 13.15 misrepresents the law.

The statutory basis for FAA's civil penalty rule, FAR § 13.15, is § 901, which reads:

> **Any person** who violates . . . **any** provision . . . [of this Act], or **any** rule, regulation or order issued thereunder . . . **shall be** subject to a civil penalty of not to exceed $1,000 for each such violation. . . .[19]

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[19] The statute was recently amended to raise the civil penalty for air carriers to $10,000; but the $1,000 limit was left untouched for individuals. P.L. 100-223, Sec. 204, 101 Stat. 1519 (1987).

49 U.S.C. app. § 1471(a)(1) [emphasis added]. The rule reads:

> (a) Under sec. 901 of the Federal Aviation Act of 1958 . . . **a person** who violates any provision . . . of that Act, or any regulation or order issued [thereunder] . . . **is subject** to a civil penalty . . .

14 C.F.R. § 13.15(a) [emphasis added].

The plain command of section 901, "Any person shall be subject to a civil penalty," cannot be reconciled with "a person is subject to a civil penalty." The rule misrepresents the law in a fundamental way. It changes a peremptory command that FAA officials use civil penalty for all violations, to "use it if you feel like it."

The rule uses the phrase "if a civil penalty is contemplated." Id. § 13.15(b). Thus it is deficient because it does not explain, if not a civil penalty, just what it is that is contemplated for the violation. We know, of course, it is certificate action. Nor does it mention that the

penalty can be shifted from suspension or revocation to a money fine.

In light of the lengths to which the agency goes in its enforcement manual to guide its officials on how to choose between the two forms of action, is it not remarkable that neither 13.19 nor 13.15 mentions the other?

By writing a regulation that misrepresents the law, fails to advise that the agency claims it can choose between civil and certificate penalties (as well as two disparate forms of justice) and that its officials may shift back and forth between them, FAA violated the APA and petitioner's right to due process under the Fifth Amendment. Pike v. C.A.B., supra, Gulf Oil Corporation v. Hickel, supra; see also Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978).

B. Both original and amended rule promulgated in violation of APA. FAR ¶

13.15 started life as 14 C.F.R. § 408.23 (1960), first published in 24 Fed. Reg. 10 (1959). It has never been promulgated through the APA public notice and comment procedures required by 5 U.S.C. § 553. It tracks FAR § 13.19 in this regard (since it was always the entire set of rules published, not single ones). FAA does not dispute this. Like 13.19, this rule is substantive because it delegates authority and legislates procedures for FAA handling of civil penalty cases, that is, creates a system not spelled out in the statute. We adopt by reference 13.19's arguments, supra.

FAR § 13.15, however, has an added dimension, however. It was once amended--on the sly, it's fair to say--completely changing its meaning, without following either the publication or notice and comment procedures of the APA. As § 408.23, and when first announced, the rule faithfully followed § 901: "Under section 901 of

the Act, any person who violates any provision . . . of the Act, or any rule, regulation, or order issued thereunder, shall be subject to a civil penalty . . ." 24 Fed. Reg. 10 (1959), 14 C.F.R. § 408.23 (1960) (a-66). The recodification project first proposed that enforcement rules be codified as Part 15. See 27 Fed. Reg. 5694 (Thursday, June 14, 1962). It was in this particular notice where the language was changed to read "a person is subject to a civil penalty." Then in yet another publication of the rules, as finally recodified, Part 15 was changed to Part 13, where it still remains. 27 Fed. Reg. 9586, 9590 (1962) (Friday, September 28, 1962). (It seems strange FAA officials had such a hard time settling on the new number.)

Nothing in the notice of June 14, 1962, explained it was changing the language of the civil penalty rule, publishing a new or amended rule of procedure, statement of

general policy, or interpretation of general applicability formulated and adopted by the agency. This violated the publication requirements of 5 U.S.C. § 552 (a)(1). As the change was obviously substantive, from peremptory command, to at your discretion, the failure to use notice and comment procedures violated id. § 553. Both failures require dismissal. Id. § 706.

C. Lack of standing. The Circuit Court holds that petitioner lacks standing to challenge the civil penalty rule. This position reflects a serious lack of understanding of FAA enforcement. It cites Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982). It is difficult to understand the relevance of a case where those who lacked standing were an independent group dedicated to challenging government action they believed violative of separation of church and state. More relevant

is United States v. SCRAP, 412 U.S. 669 (1973). If a group of law students concerned about forests being trashed because of a freight-rate increase have standing, where does that leave petitioner whose license is subject to an integrated FAA enforcement program that includes both civil and license penalties?

The Valley Forge test cited is that petitioner may invoke the court's authority only if he "has suffered injury, whether past or future, that the injury is traceable to the action of the defending party, and that a favorable ruling by the court is likely to remedy the harm." 832 F.2d at 1295-96. Petitioner fully meets this test. As the manual makes clear, before initiating the case against him, FAA officials were required to choose between certificate action and civil penalty. The injury is obvious: by choosing to suspend his license, petitioner was denied the right to

have his trial in district court where, should he have so desired, he could have "demanded" a jury; he was denied the opportunity to negotiate a compromise and, failing that, if convicted, a money fine was the worst he'd have suffered.

The District of Columbia Circuit also overlooked the shift in sanctions policy, which puts the issue squarely within the APA. As we have shown, this is an integral part of enforcement policy; 99.99 % of shifts are from certificate action to money fine. The only survey to our knowledge ever done showed that 35% of all civil penalties started as certificate actions. See Emperor at 79 n. 115. The Circuit Court is clearly saying, if the agency chooses not to use civil penalty in your case, you can't complain. The irony of this is that it leaves one's standing completely in control of the agency itself.

How could petitioner "be required to re-

sort to," 5 U.S.C. § 552(a)(1), the shift in sanctions policy when it had never been published in the Federal Register?[20] See W.G. Cosby Transfer & Storage Corporation v. Froehlke, 480 F.2d 498, 503 (4th Cir. 1973) ("Before debarring a contractor from future government contracts, a federal agency must comply with § 3(a) of the [APA] by stating and publishing its rules of procedure. [Citing cases]"). Petitioner has standing.

Should the Court decline to take jurisdiction of this case, we respectfully ask it to at the least consider this standing issue, and if favorable to petitioner, remand to the District of Columbia Circuit with instructions to decide the civil penalty issues.

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[20] And how would he know? This writer has interviewed dozens of airmen; it is certain the vast majority, and most of their lawyers, do not know of this shift policy. How would they, with no rule?

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Should the Court not take jurisdiction, petitioner asks it to take cognizance of the standing issue and the fact the District of Columbia Circuit failed to address the several legitimate issues noted, any one of which would have been dispositive of the case, and in exercise of its supervisory powers to remand to that court for their disposition.

Respectfully submitted,

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